Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

91-2054

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

VINCENT JAMES LANDANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN F. DALY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

89

QUESTION PRESENTED

Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), permits the withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in a criminal investigation, information provided by such a source. The question presented is:

Whether, in light of the confidentiality that is inherent whenever the FBI gathers information during a criminal investigation, Exemption 7(D) protects all sources of such information, in the absence of evidence negating the premise of confidentiality for a particular source.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	20
Appendix A	1a
Appendix B	31a
Appendix C	48a
Appendix D	62a

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	3
CIA v. *Sims*, 471 U.S. 159 (1985)	18
Diamond v. *FBI*, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984)	8
Donovan v. *FBI*, 806 F.2d 55 (2d Cir. 1986)	8, 13
Dow Jones & Co. v. *Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990)	8, 9, 16, 17
Ingle v. *Department of Justice*, 698 F.2d 259 (6th Cir. 1983)	8, 12
Irons v. *FBI*, 880 F.2d 1446 (1st Cir. 1989)	8, 12, 14
Johnson v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984)	8, 11, 12
Keeney v. *FBI*, 630 F.2d 114 (2d Cir. 1980)	9
Keys v. *United States Dep't of Justice*, 830 F.2d 337 (D.C. Cir. 1987)	12
Lame v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981)	5
Landano v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989)	3
Landano v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990)	3

Cases—Continued: Page

Lewis v. *University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984) 7
Miller v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) 8, 12
Nadler v. *United States Dep't of Justice*, 955 F.2d 1479 (11th Cir. 1992) 8, 10, 12-13, 16, 17
Nix v. *United States*, 572 F.2d 998 (4th Cir. 1978) 8
Parton v. *United States Dep't of Justice*, 727 F.2d 774 (8th Cir. 1984) 8-9
Schmerler v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990) 8, 13
Shaw v. *FBI*, 749 F.2d 55 (D.C. Cir. 1984) 10
Spannaus v. *United States Dep't of Justice*, 813 F.2d 1285 (4th Cir. 1987) 16
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 16
United States Dep't of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) 5, 6, 15
United States Dep't of State v. *Ray*, 112 S. Ct. 541 (1991) 5
Vaughn v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 19
Wiener v. *FBI*, 943 F.2d 972 (9th Cir. 1991), petition for cert. pending, No. 91-1641 ..... 8, 19

Statutes and rules:

Freedom of Information Act, 5 U.S.C. 552 2
5 U.S.C. 552(a)(4)(B) 16
5 U.S.C. 552(b)(6) 3
5 U.S.C. 552(b)(7) 2, 7, 15, 16, 18
5 U.S.C. 552(b)(7)(A) 16
5 U.S.C. 552(b)(7)(C) 3, 4, 5, 6, 15, 16
5 U.S.C. 552(b)(7)(D) (1982) 13, 14, 18
5 U.S.C. 552(b)(7)(D) ..... *passim*
2d Cir. R. 35 7
3d Cir. I.O.P.:
Rule 9.5.3 7
Rule 9.6.4 7

Miscellaneous: Page

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. (1974) 6, 11
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 15, 18
Webster's Third New International Dictionary (1986) 10

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

VINCENT JAMES LANDANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice and the Federal Bureau of Investigation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (App., *infra*, 31a-47a and 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. App., *infra*, 62a-63a. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

STATEMENT

1. Respondent was convicted in state court for the 1976 murder of John Snow, a New Jersey police officer. In September 1988 and January 1989, respondent filed requests with the FBI under the Freedom of Information Act (FOIA) for information that the FBI had compiled in the course of its involvement in the investigation.[1] In May 1990, the

[1] Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects. Respondent has insisted that Victor Forni was the actual killer and that New Jersey officials withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Respondent's initial efforts to obtain habeas corpus relief in state and federal court were unsuccessful. *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989). The federal district court subsequently granted relief, based on allegations of newly discovered evidence; that ruling, however, was reversed because of petitioner's failure to exhaust state remedies. *Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990). Respondent is now pursuing those issues in the New Jersey courts. App., *infra*, 2a.

FBI released several hundred pages of documents, some of which contained redactions, and withheld several hundred other pages in their entirety. Material was withheld principally under FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), which protect against unwarranted invasions of personal privacy, and Exemption 7(D), 5 U.S.C. 552(b)(7)(D), which protects confidential sources of law enforcement information.[2]

Respondent filed the present action in May 1990. Both sides moved for summary judgment. The Department of Justice and the FBI (hereinafter the FBI) submitted the declaration of Special Agent Regina M. Superneau, which described the FBI's

[2] The records released in May 1990 related to respondent's first and principal request, which was for all records concerning the investigation of Officer Snow's murder. Respondent's second FOIA request—for records specifically concerning Forni—was initially denied in its entirety under Exemption 7(C). Forni subsequently consented to disclosure, and the FBI then reprocessed the second request without reliance on any privacy interests of Forni. App., *infra*, 35a-36a. The Exemption 7(D) rulings of the courts below related to both sets of records. *Id.* at 51a-52a.

search for the requested records and the reasons for withholding various portions of them. C.A. App. 156-185. The declaration discussed in detail the FBI's rationale for invoking a particular exemption for each category of information and assigned a code to each category. The same codes were then used to indicate, on a set of redacted documents, the reasons for each withholding. *Id.* at 166-167 (¶¶ 17-20); see App., *infra*, 37a-38a. For example, category "(b)(7)(D)-(3)" referred to individuals who provided information under implied promises of confidentiality, and to information provided by such persons. C.A. App. 179-183 (¶¶ 47-52). The declaration also described in detail the FBI's need for cooperation by such persons, the inherent dangers they would confront if their identities or the information they furnished were released to the public, and the implicit assurances of confidentiality present whenever the FBI interviews individuals in the course of a criminal investigation. *Ibid.* Other categories of information for which the FBI invoked Exemption 7(D) included internal FBI source symbols for especially sensitive informants, identities of and information provided by informants who provided information to the FBI on a continuing basis, identities of and information provided by local law enforcement agencies, and identities of and information provided by financial or commercial institutions. *Id.* at 176-185 (¶¶ 43-55); see App., *infra*, 19a-20a.

2. In a decision dated November 29, 1990, the district court sustained some of the FBI's withholdings, but rejected many of its pivotal arguments under Exemptions 7(C) and 7(D). App., *infra*, 31a-47a. With respect to Exemption 7(D), at issue here, the court held that the FBI's categorical explanations sufficed for certain witnesses and "undercover agents," but that for "all other information withheld

by defendant under (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by [the FBI]." App., *infra*, 45a.[3]

In response to the FBI's motion for reconsideration, the court reaffirmed and explained its ruling. App., *infra*, 48a-61a. Citing the Third Circuit's ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (1981), the court held that the FBI must make a particularized showing regarding the circumstances of each source for which it invokes Exemption 7(D). It accordingly rejected the proposition that promises of confidentiality are "inherently implicit" whenever the FBI collects information in the course of a criminal investigation. App., *infra*, 52a-55a.

3. A panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-30a. On the issue of invasion of personal privacy under Exemption 7(C), the court of appeals joined several other courts in recognizing that persons whose names appear in criminal law enforcement records necessarily have a significant privacy interest regarding the release of such information. *Id.* at 6a-7a. It also recognized that under *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991), there is no cognizable "public interest" in the disclosure of the records withheld under Exemption 7(C), because there is no indication that they would reveal anything about the workings of the FBI. The court of appeals accordingly reversed the district court's judgment insofar as it ordered release of information the

[3] The court declined to conduct an *in camera* inspection of the documents. App., *infra*, 45a-46a.

FBI had withheld under Exemption 7(C). App., *infra*, 9a-17a.

By contrast, the panel affirmed the district court's order requiring release of information the FBI had withheld under Exemption 7(D). App., *infra*, 17a-30a. The panel recognized that Exemption 7(D) applies to all "confidential sources," without resort to any balancing of interests. *Id.* at 18a. This principle, the panel explained, reflects the purpose of Exemption 7(D), which is not primarily intended to protect the interests of the sources themselves, but rather serves "to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." *Ibid.* The panel also noted the Conference Report's statement that Exemption 7(D) applies broadly to "citizen volunteer[s]," including both those who were expressly assured confidentiality and those who provided information "in circumstances from which such an assurance could reasonably be inferred." *Id.* at 21a, 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). Further, the panel recognized that the 1986 Amendments to FOIA—which permit an agency to withhold information that "could reasonably be expected to disclose" the identity of a confidential source or information furnished by such a source in a criminal investigation—were intended to "lighten the agency's burden in invoking Exemption 7." *Id.* at 23a (quoting *Reporters Committee*, 489 U.S. at 756 n.9).

The panel nevertheless rejected the FBI's submission that, in light of the sensitive nature of FBI criminal investigations, the very fact that a person provides information to the FBI in the course of such an investigation is sufficient (in the absence of contrary evidence) to support an inference of confi-

dentiality, and therefore to permit withholding under Exemption 7(D). While acknowledging conflicting decisions in a number of other circuits and characterizing the question as "difficult" (App., *infra*, 21a-23a, 26a), the panel deemed itself bound by the Third Circuit's prior decision in *Lame*, which it read to require "a showing by the government of the particular circumstances of an interview or source." *Id.* at 28a. The panel rejected the FBI's argument that *Lame*'s rationale has been superseded by *Reporters Committee*'s approval of a categorical approach to withholding under Exemption 7, and by the 1986 amendments' lessening of the government's burden under that exemption. *Id.* at 28a-29a.

Because of the importance of Exemption 7(D) in protecting confidential sources and the panel's acknowledgement that its approach diverged from that of several other courts of appeals, the FBI filed a petition for rehearing with suggestion of rehearing en banc, so that the full court of appeals could reconsider *Lame*. The court of appeals denied rehearing, even though a majority of the judges voting (including Judge Stapleton, the author of the panel opinion) voted to rehear the case en banc. App., *infra*, 62a-63a.[4]

---

[4] The vote was 5-4 in favor of rehearing, with two judges recused. Although the rules of some circuits would have resulted in the granting of rehearing en banc under such circumstances (see, *e.g.*, 2d Cir. R. 35), the Third Circuit adheres to the rule that rehearing en banc may be ordered only upon the affirmative vote of a majority of all active judges. See *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 928 (1983) (statement of Adams, J.), cert. denied, 469 U.S. 892 (1984). (Because Senior Judge Aldisert was a member of the panel, he could have participated if rehearing en banc had been granted; he could not, however, vote on the question of granting rehearing en banc. See 3d Cir. I.O.P. 9.5.3, 9.6.4.)

REASONS FOR GRANTING THE PETITION

In reaffirming its rule that an agency's invocation of Exemption 7(D) must be based on "detailed explanations relating to each alleged confidential source" (App., *infra*, 27a), the Third Circuit has placed itself in conflict with at least six of its sister circuits. Those courts have recognized that confidentiality is implicit in the very nature of an FBI interview conducted in the course of a criminal investigation, and they accordingly have held that FOIA does not require an individualized showing of the circumstances of each such interview. See *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 575-577 (D.C. Cir. 1990); *Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990); *Donovan* v. *FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Miller* v. *Bell*, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1517-1518 (10th Cir. 1984); *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484-1487 (11th Cir. 1992); see also *Irons* v. *FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc) (dictum).[5]

[5] The only court of appeals that has given any indication that it would follow an approach similar to that of the Third Circuit is the Ninth Circuit, in *Wiener* v. *FBI*, 943 F.2d 972, 987 & n.29 (1991), petition for cert. pending, No. 91-1641. See note 11, *infra*. Although the Tenth Circuit in *Johnson* identified the Second, Fourth, and Eighth Circuits as requiring a more detailed evidentiary showing, 739 F.2d at 1517, the cases it cited merely mentioned the specific circumstances that were shown in those cases; none held that such a showing is required. See *Nix* v. *United States*, 572 F.2d 998, 1003-1004 (4th Cir. 1978); *Parton* v. *United States Dep't of Justice*, 727 F.2d 774, 776-777 (8th Cir. 1984); *Keeney* v. *FBI*, 630 F.2d 114, 119-120 (2d Cir. 1980).

The rule adopted by other courts of appeals is fully consistent with the text of Exemption 7(D)—especially in light of the 1986 amendments—and is essential to enable the exemption to serve its intended purpose of ensuring the continued flow of law enforcement information. The decision below, by contrast, endangers continued access to law enforcement sources by the FBI and other agencies, because it imposes an evidentiary burden that will, in many instances, be impossible to meet. Review is warranted to resolve the circuit conflict and to preserve the ability of the FBI and other federal law enforcement agencies to protect vital sources of information.

1. The court of appeals erred in holding that the FBI was required to submit detailed evidence concerning the particular interview in which a given source furnished information to the government in order to establish that the source is "confidential." It was sufficient for the FBI to show, as it indisputably did, that the source furnished information to the FBI in the course of a criminal investigation. Confidentiality is inherent in that setting.

a. Exemption 7(D) permits the FBI or other law enforcement agency to withhold records if their production "could reasonably be expected to disclose the identity of a confidential source."[6] This language refers to the confidentiality of the source, not the particular interview or the information it yields. See *Dow Jones*, 917 F.2d at 578. It therefore does not

[6] Exemption 7(D) further permits withholding if release could reasonably be expected to disclose "information furnished by a confidential source" to a law enforcement agency in the course of a criminal investigation.

suggest that the FBI must introduce evidence, satisfactory to a court, concerning the details of the FBI's interviews with each source.

Under the most natural meaning of the word "confidential" as used in the clause quoted above, a source is "confidential" if he is "known only to a limited few" and his identity is "not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Persons who furnish information to the FBI in the course of criminal investigations will almost invariably satisfy this standard.

The word "confidential" may also mean "communicated, conveyed, acted on, or practiced in confidence." *Webster's Third New International Dictionary* 476 (1986); see *Shaw* v. *FBI*, 749 F.2d 55, 61 (D.C. Cir. 1984). The FBI's withholding in this case was fully consistent with the statutory text even if the word "confidential" embraces this meaning as well. Based on its accumulated experience and expertise, the FBI has reasonably concluded that it must maintain the atmosphere of "confidence"—*i.e.*, trust and privacy[7]—in which such information is "conveyed" or "communicated" by sources and "acted on" by the FBI. See *Nadler*, 955 F.2d at 1486 ("The FBI has a long-standing policy of treating as confidential all information obtained during the course of an investigation.").[8] Neither court below pointed

[7] See *Webster's Third New International Dictionary* 476 (1986) ("confidence"; def. 6).

[8] Because Exemption 7(D) permits an agency to withhold information that could disclose the identity of one of its "confidential source[s]," the statutory text attaches considerable significance to whether the source is "confidential" from the agency's perspective. By the same token, "[m]ost people would assume that the information they give to a criminal

to any basis for discrediting the FBI's assessment of the confidential role of sources in its criminal investigations. Nor did either court cite any evidence that might rebut this general rule with respect to any of the sources in this case. Accordingly, the FBI's withholding is fully supported by the statutory text.

By contrast, nothing in the text of Exemption 7(D) supports the Third Circuit's holding that the FBI may *not* presumptively treat as confidential and shield from public view the identities of all persons who furnish information in the course of its criminal investigations. Exemption 7(D), on its face, requires no more than that a source having certain characteristics may reasonably be deemed "confidential," and that the release of the requested information could reasonably be expected to disclose the identity of a source falling within that category.

b. The legislative history of Exemption 7(D) confirms the breadth of the category of sources that Congress intended the exemption to protect. As the court below noted, Congress rejected the term "informer" (which had been used in the Senate bill) in order to make clear that the exemption would protect not only paid informants, but "also a 'citizen volunteer' who has 'provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred.'" App., *infra*, 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)) (emphasis added by court). Here, the relevant "circumstances" are that the source furnished information in the course of a criminal investigation; in that setting, an assurance of confidentiality may

law enforcement official during a criminal investigation will be kept confidential." *Johnson*, 739 F.2d at 1518.

"reasonably be inferred." The Conference Report does not suggest a further requirement, not contained in the text of Exemption 7(D), that the FBI must produce detailed evidence about the interview with each source.

c. Even before the 1986 amendments to Exemption 7, well-reasoned appellate decisions recognized that a showing of the latter sort is not required. In its seminal decision in *Miller* v. *Bell*, the Seventh Circuit approved the FBI's invocation of Exemption 7(D) on the basis of an affidavit that, like the one submitted in this case, identified excisions by type and addressed applicable confidentiality concerns, without describing the specifics of each interview. See 661 F.2d at 627. The court discussed the legislative history surrounding the original enactment of Exemption 7(D) in 1974, which established that Congress did not intend to impose a "heavy burden" on the FBI in protecting sources. *Ibid.*; accord, *Nadler*, 955 F.2d at 1485 (discussing 1974 legislative history). The *Miller* court then recognized that the very nature of FBI criminal investigations justifies invocation of Exemption 7(D):

> Unless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation. This is necessary not only to protect the individual interviewee, but also to insure the continuing efficacy of FBI criminal investigation.

661 F.2d at 627. Other courts have echoed the "inherently implicit" language in reaching the same result. See *Keys* v. *United States Dep't of Justice*, 830 F.2d 337, 345 (D.C. Cir. 1987); *Ingle*, 698 F.2d at 269; *Johnson*, 739 F.2d at 1517-1518; *Nadler*, 955 F.2d at 1486; *Irons*, 880 F.2d at 1447 (dictum).

The courts adopting this approach have also emphasized the enormous practical difficulties that the FBI and other federal law enforcement agencies would confront if they were required to make an individualized showing of the circumstances surrounding each witness interview. For example, in *Donovan*, the Second Circuit recognized that the law enforcement function of the FBI "depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known." 806 F.2d at 61. Accordingly, it adopted the approach that we urge, because it realized that to require a source-by-source showing of confidentiality would impose an enormous "practical difficulty—if not impossibility" on the use of Exemption 7(D). *Ibid.*; see also *Nadler*, 955 F.2d at 1485-1486. The present case illustrates this difficulty, because the records respondent seeks are for the most part 15 years old. See also *Schmerler*, 900 F.2d at 336 (upholding application of Exemption 7(D) to records over 50 years old). It will frequently be impossible for the FBI to produce affiants with first-hand recollection of such matters. Furthermore, records of witness interviews typically provide little detail about the conduct of the interview; they merely set forth the substantive information the FBI must have to get its work done. Accordingly, an artificial requirement of "detailed explanations relating to each alleged confidential source" (App., *infra*, 27a) is a recipe for *precluding* the protection of confidential sources in many instances.

d. For the foregoing reasons, the ruling below would be incorrect even if the question were—as it was under Exemption 7(D) prior to 1986—whether

release of the requested records "would * * * disclose" confidential source information. 5 U.S.C. 552(b)(7)(D) (1982). The basic fact that a source revealed information to the FBI in the course of a criminal investigation is sufficient (in the absence of contrary evidence) for a court to conclude that the source qualifies as a "confidential source."

The proper approach to this issue is made even clearer, however, by the 1986 amendments to Exemption 7(D), which were specifically intended to "broaden the reach of [Exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it." *Irons*, 880 F.2d at 1452. Under the amended version of Exemption 7(D), the FBI need not show that release of a particular record "would * * * disclose" confidential source information; it need only show that release "could reasonably be expected to disclose" such information.

The court below recognized that this amendment concerns "the degree of risk of confidential source disclosure Congress was willing to accept" (App., *infra*, 29a), but it failed to appreciate that the amendment on its face encompasses more than one kind of risk. One form of uncertainty to which that language clearly applies is the situation where the requested information does not expressly identify the source, but "could reasonably be expected" to have that effect if disclosed because it contains potentially identifying clues. A different form of uncertainty is presented here. Where, as is typically the case, the FBI possesses material that a person provided in the course of a criminal investigation but has little or no further information about the precise circumstances under which he did so, it nonetheless is very likely as an empirical matter (given the circumstances of criminal investigations generally) that

the person qualifies as a "confidential source." It may be difficult in a given case to prove with certainty that the particular source is confidential, and therefore that production of the requested documents "would" disclose the identity of a confidential source, as Exemption 7(D) previously required. But now the FBI need only show that it "could reasonably be expected" that production would disclose the identity of a confidential source. This language naturally encompasses the situation presented here, in which disclosure would identify a source, and it is highly likely (even if not certain) that the source qualifies as "confidential."

This Court has recognized the relationship between the "could reasonably be expected" language—which was inserted in 1986 into several subparts of Exemption 7—and the level of specificity needed to invoke the relevant exemption. In *Reporters Committee*, the Court considered the application of Exemption 7(C) to FBI "rap sheets." In light of the nature of the information in rap sheets—for which disclosure would invariably engender some invasion of privacy, yet would not ordinarily provide the public with any meaningful information about the conduct of the FBI —the Court concluded that a "categorical" approach was appropriate. It accordingly held that rap sheets as a class are protected by Exemption 7(C), without any need for a case-by-case assessment. 489 U.S. at 776-778. The Court pointed out that such a categorical approach finds specific support in the 1986 amendments, which were "intended to replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test.'" *Id.* at 778 n.22 (quoting S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983)); cf. *Spannaus* v.

United States Dep't of Justice, 813 F.2d 1285, 1288-1289 (4th Cir. 1987) (discussing effect of 1986 amendments on Exemption 7(A)).

The court below erroneously dismissed *Reporters Committee* as irrelevant on the ground that it involved the Exemption 7(C) "balancing" test. App., *infra*, 29a. By contrast, other courts addressing the same issue have recognized the importance of *Reporters Committee*'s teachings concerning the propriety of categorical analyses under Exemption 7 generally. For example, in *Dow Jones*, the D.C. Circuit reaffirmed its rule that there is a "presumption" of confidentiality whenever the FBI receives information in the course of a criminal investigation, and that the presumption can be overcome only by evidence specifically negating the normal inference of confidentiality.[9] The *Dow Jones* court relied on *Reporters Committee* in concluding that the sort of categorical determination embodied in this presumption is an appropriate and useful means of avoiding "*ad*

[9] The court below properly discounted respondent's objection that a "presumption" of an assurance of confidentiality would be inconsistent with the requirement in 5 U.S.C. 552 (a) (4) (B) that the government bear the burden in justifying withholding. See App., *infra*, 23a. As the D.C. Circuit explained in *Dow Jones*, there is no inconsistency between use of a presumption and the statutory burden of proof, because the presumption is directed to "the quantum of evidence necessary to carry the burden." 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc); see also *Nadler*, 955 F.2d at 1486 (endorsing "presumption"). In any event, the formulation preferred by the court below—focusing on what showing is necessary to establish a "*prima facie* case" under Exemption 7(D) (App., *infra*, 23a-24a)—is not inconsistent with recognition of a "presumption." See generally *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981).

hoc—and therefore unprincipled—determinations." 917 F.2d at 577; see also *id.* at 579 (Silberman, J., concurring in denial of rehearing en banc). Accord, *Nadler*, 955 F.2d at 1486-1487 n.7 (citing *Reporters Committee* in support of proposition that "the congressional requirement of a specific showing of confidentiality does not prevent a categorical determination that sources in an FBI criminal investigation are presumptively confidential").

2. The decision of the Third Circuit plainly warrants review. In requiring an individualized factual showing regarding the circumstances of each source in order to invoke Exemption 7(D), the Third Circuit has ignored this Court's teachings, added a burdensome requirement not called for by the text of Exemption 7(D), and endangered the continuing access of the FBI and other federal law enforcement agencies to sources of vital information. The practical ramifications of the decision below stem not only from the inability of the FBI to protect sources in many instances, but also from the chilling effect that even *uncertainty* about the application of Exemption 7(D) can have on potential witnesses. As the Eleventh Circuit recognized in *Nadler* (955 F.2d at 1486):

> a rule requiring the FBI to produce evidence regarding each individual source's particular expectations as to confidentiality would cause potential sources to fear that the information they relay to the FBI will become public knowledge along with their identity and the fact that they freely disclosed the information to the FBI. Moreover, it is beyond dispute that an increased fear of exposure would chill the public's willing-

ness to cooperate with the FBI in the course of criminal investigations.[10]

These concerns conform to those expressed by Congress itself when it enacted the 1986 amendments. The Senate Committee that initially recommended those amendments reported that the difficulty encountered by agencies in invoking Exemption 7 had "harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations," and had "slowed the flow of confidential information to the law enforcement community." S. Rep. No. 221, *supra*, at 2. The committee specifically related these problems to the "would * * * disclose" formulation in the prior version of Exemption 7(D), explaining that the burden of proof inherent in that language was "substantially contributing to the asserted 'perception' problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA." S. Rep. No. 221, *supra*, at 23-24. In substituting the "could reasonably be expected" standard, Congress "recognize[d] the lack of certainty in attempting to predict harm" from disclosure. *Id.* at 24.

---

[10] In an analogous context, this Court expressed "serious[] doubt[s] whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *CIA* v. *Sims*, 471 U.S. 159, 176 (1985). Whether the question concerns the circumstances justifying a promise of confidentiality in an intelligence matter or the circumstances justifying an inference of confidentiality in a criminal matter, "[t]here is no reason for a potential * * * source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly." *Ibid.*

Effectuation of the purposes served by Exemption 7(D) not only requires adoption of the approach we urge on the merits; it also requires consistency and clarity in the law as articulated by the various federal courts. As explained above, the inconsistency between the ruling below and those of numerous other circuits could not be more evident. The panel itself acknowledged that "six other courts of appeals have reached decisions that are in tension, if not in direct conflict, with" the rule it reaffirmed. App., *infra*, 30a; see page 8, *supra*. Only if the courts speak with one voice can the FBI and the sources upon which it relies proceed with sufficient assurance that information furnished in the course of criminal investigations will remain confidential. Given the ruling below, that consistency and clarity can now be provided only by this Court.[11]

---

[11] In *Wiener* v. *FBI*, the Ninth Circuit purported to leave open the possibility of employing a "presumption" of confidential status for sources under Exemption 7(D). Nevertheless, as part of its broad ruling concerning the level of detail necessary in *Vaughn* indices (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)), it imposed an evidentiary requirement that the FBI show the individual circumstances of each source. 943 F.2d at 987 & n.29. As we have pointed out in our certiorari petition in *Wiener*, that ruling effectively conflicts with the decisions of other circuits applying Exemption 7(D). See No. 91-1641 Pet. 18-19. However, because the focus of the certiorari petition in *Wiener* is on the distinct procedural issue of the adequacy of *Vaughn* indices, the Court's decision in *Wiener* (if certiorari is granted) might not resolve the circuit conflict concerning the substantive protection afforded by Exemption 7(D).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN F. DALY
Attorneys

JUNE 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 91-5161

VINCENT JAMES LANDANO

v.

UNITED STATES DEPARTMENT OF JUSTICE;
THE FEDERAL BUREAU OF INVESTIGATION,
APPELLANTS

Argued May 20, 1991

Decided Feb. 11, 1992

As Amended Feb. 24, 1992

Before STAPLETON, SCIRICA and ADLISERT, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

In this appeal, we focus on Exemptions 7(C) and 7(D) to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C)-(D). These exemptions are at the center of a dispute between plaintiff-appellee Vincent Landano and defendants-appellants

the Federal Bureau of Investigation and Department of Justice (collectively the "FBI") over Landano's request under the FOIA for documents relating to the 1976 murder of a police officer. Landano was convicted for that murder in a New Jersey state court. The district court granted summary judgment to Landano and ordered the FBI to release information that it had withheld as exempt. The FBI has appealed. We will affirm in part, reverse in part, and remand.

I.

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey. During the course of the robbery, one of the two men shot and killed a police officer, John Snow. The FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder. A state grand jury indicted Landano for felony murder, and he was convicted. Landano has always maintained that he did not participate in the robbery and that a man named Victor Forni was the killer of Officer Snow.

Landano attacked his conviction in a federal habeas corpus proceeding asserting that the state prosecutors violated the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by suppressing exculpatory evidence. The United States District Court for the District of New Jersey found merit in this argument and ordered that Landano be retried or released. This court reversed because Landano had not exhausted his state remedies. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.), *cert. denied*, ——U.S.——, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990). Landano is apparently pursuing that claim at present in the New Jersey state court system.

Landano has simultaneously sought to obtain FBI files under the FOIA in the hope that they will contain exculpatory evidence or lead to the discovery of such evidence. Landano first sent a letter to the FBI's Newark field office requesting all information pertaining to the murder of Officer Snow. In response, the FBI provided 324 pages of a 726-page file, some of which were redacted. Thereafter, Landano sent the FBI a request for all information on Victor Forni. The FBI released only a portion of that file as well. As to the information in the Snow and the Forni files at issue here, the FBI contended that the release of some of the information would violate the privacy rights of individuals named in those files and that the release of other information would violate confidentiality expressly or impliedly promised by the FBI to persons from whom the FBI received information in the course of its investigation.

After exhausting his administrative appeals, Landano initiated this proceeding in the district court requesting that the court order the FBI to produce the entire contents of the requested files. The FBI submitted an affidavit of FBI Special Agent Regina Superneau detailing its reasons for withholding information under Exemptions 7(C) and 7(D), as well as under other exemptions not at issue here. The court granted summary judgment to Landano and ordered the FBI to release essentially all of the withheld material other than information that would disclose the identity of, or communications from, informants or undercover agents.

II.

The FOIA, which is a part of the Administrative Procedure Act, requires that any federal agency promptly make available any records requested of it

by any person so long as the request "reasonably describes such records." 5 U.S.C. § 552(a)(3). If an agency improperly withholds such documents, a federal district court may order production. Congress has exempted nine important categories of information from this blanket requirement, however. In this case, we are concerned with Exemption 7(C) and Exemption 7(D).

A. *Exemption 7(C).*

We first consider of Exemption 7(C). Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). If the agency invokes Exemption 7(C), it has the burden "to sustain its action." *Id.* § 552(a)(4)(B).

An agency's invocation of Exemption 7(C) requires us to identify the privacy interests that would be affected by release of the requested information as well as the public interests that would be served by disclosure. After identifying the competing interests we are then called upon to balance those interests to determine if disclosure is appropriate, i.e., whether disclosure "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy." § 552(b)(7)(C) (emphasis supplied). *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

Landano does not dispute the right of the FBI to withhold the names of FBI undercover agents or FBI informants. We are concerned here with: (1) the names of other FBI employees that appear in the requested documents; (2) the names of the persons interviewed during the investigation; (3) the names of third parties mentioned by those interviewed; and (4) the identities of state and local law enforcement personnel who participated in the investigation. Thus, our Exemption 7(C) analysis is concerned solely with the failure to disclose the identity of individuals who were involved in the investigation or in the events with which the investigation was concerned.

1. *Privacy Interests*

The district court held that the FBI had not made an adequate showing that disclosure of the information withheld under Exemption 7(C) would implicate anyone's privacy interest. In its words, the "defendant offers nothing to convince the court that the dangers involved in releasing such information exist in this particular case, particularly in view of the approximately 14 years which have elapsed since the underlying investigation." *Landano v. United States Dep't of Justice*, 751 F.Supp. 502, 508 (D.N.J.1990). We do not agree.

Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation. *See, e.g., Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C.Cir.1991) ("suspects, witnesses and investigators" have privacy interests implicated by release of their names in connection with a criminal investigation); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir.1990) (witnesses and persons named by them have privacy

interests). Suspects of the investigation have the most obvious privacy interest in not having their identities so revealed. *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1338 (D.C.Cir.1980). However, disclosure of the names of interviewees and witnesses may result in embarrassment and harassment to them as well. Criminal investigations turn up a myriad of details about the personal lives of witnesses and interviewees and for some, disclosure of the fact of cooperation with the investigation may itself result in reprisals or strained personal relationships. Moreover, as this case demonstrates, many people may have reason to seek out and question those who have supplied information in the course of a criminal investigation. *See, e.g., Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir.1989), ("many of the nonsuspects who are identified or referred to in the transcripts have discernible privacy interests in not having their thoughts, comments, and views regarding their work, their job performance, and their co-workers, clients, and friends released to the public. Moreover, merely being associated with a criminal investigation may lead to further embarrassment and difficulties."); *Cleary v. FBI*, 811 F.2d 421, 424 (8th Cir.1987) (recognizing privacy interests in avoiding "unnecessary questioning concerning the investigation [and] subpoenas issued by private litigants in civil suits incidentally related to the investigation," although conceding that these privacy interests may be overborne by greater public interests).

Moreover, this court has held that even the law enforcement personnel involved in a criminal investigation have a privacy interest, cognizable under Exemption 7(C), in not having their identities disclosed. In *Patterson by Patterson v. FBI*, 893 F.2d

595, 601 (3d Cir.), *cert. denied*, ——U.S.——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990), we concluded that the FBI acted properly in withholding under Exemption 7(C) the names of the FBI personnel who had conducted an investigation because investigators have a privacy interest in not being identified with particular investigations and because in the context of that case "only a negligible benefit would inure to the public by releasing" the names of the law enforcement personnel involved. Other courts of appeals have recognized the same privacy interest. *See, e.g., Ingle v. United States Dep't of Justice*, 698 F.2d 259, 269 (6th Cir.1983) ("It is, of course, well established that FBI agents themselves have the right to be protected against public disclosure of their participation in law enforcement investigations pursuant to exemption (b)(7)(C)."); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir.1978) ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.").

Our decision in *Lame v. United States Department of Justice*, 654 F.2d 917 (3d Cir.1981) is not at odds with these authorities. There, we stated that there is no *per se* rule that "the mere connection of an individual with a criminal investigation constitutes an *unwarranted* invasion of his privacy." *Id.* at 923 n.6 (emphasis added). We read this observation not to imply that such a person has no privacy interest in such a case, but rather that such a privacy interest does not always trump the public interest in disclosure. The inclusion in this observation of the word

"unwarranted," which is the textual basis for the balancing of private and public interests under Exemption 7(C), supports this reading of *Lame*.

While the privacy interests of those involved in a criminal investigation may become diluted by the passage of time, several courts have recognized that the potential for embarrassment and harassment may endure for many years. *E.g., Keys v. United States Dep't of Justice*, 830 F.2d 337, 348 (D.C.Cir.1987) (The passage of forty years "does not so dilute the privacy interest as to tip the balance the other way."); *Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir. 1983) ("For persons who were subjects of an FBI investigation or who cooperated with the agency [during the McCarthy era] the potential for embarrassment, harassment, or other repercussions remains acute"), *cert. denied*, 465 U.S. 1004, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).[1] Since interest in the Snow homicide has not been extinguished by time, it seems apparent to us that some potential for embarrassment and harassment remains. Indeed, Landano

[1] An example of the longevity of individual privacy interests in government files has made its way into recent newspapers. With the unification of East and West Germany came the problem of dealing with the 6 million dossiers that the East German Secret Police had compiled on individuals within the country. The government of the unified Germany has chosen to release a person's file if that individual requests it. As a result, dissidents and other citizens now have access to the names of informers who passed information to the government. In one instance, an East German opposition leader who is now a member of the new parliament discovered that her husband had been passing information to the government for many years. *See Germans Rush to See Big Brother's Files*, Chi. Trib., Jan. 3, 1992, at 4; John Tagliabue, *Files of East German Secret Police Are Opened but Few Seek Access*, N.Y. Times, Jan. 3, 1992, at A2.

candidly acknowledges that he wants the names disclosed so that he may track down and question the participants in the Snow investigation. While his desire to do so is understandable and while their interest in not having the matter resurrected in their lives is not necessarily entitled to prevail, Landano's intentions do bear witness to the fact that privacy interests remain despite the passage of years.

We hold in accord with *Patterson* that individuals who are associated with a criminal investigation have a privacy interest under Exemption 7(C) of the FOIA such that the government may be justified in refusing to disclose their names. While that interest may be stronger for some categories of these persons than for others, we need not resolve that question until we are forced to balance the privacy interests that would be affected by disclosure against the public interest in disclosure.

2. *Public Interest*

We turn now to the asserted public interest in disclosure of these names. The district court concluded that Landano's "right to information that establishes his innocence and the public's interest in assuring that the innocent are not wrongfully convicted and confined furthers the policy concerns which engendered the statute." 751 F.Supp. at 503. The district court cited *Ferri v. Bell*, 645 F.2d 1213 (3d Cir. 1981) in support of this conclusion. There, a *federal* defendant requested material from the FBI files in order to show that *federal* prosecutors violated the *Brady* rule. We held that disclosure of such material would advance an "indirect public purpose." *Id.* at 1218. However, recognizing a public interest under the FOIA in uncovering federal violations of the

Brady rule does not require that we recognize an identical public interest in uncovering state violations of *Brady*.

Two recent decisions of the Supreme Court guide us in identifying the relevant public interests to be weighed against the privacy interest we have just discussed: *Reporters Committee* and *United States Department of State v. Ray*, —— U.S. ——, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991). When the Supreme Court in *Reporters Committee* addressed the relevant public interest involved in withholding of an FBI rap sheet on a private individual, it first repeated statements from its earlier decisions that neither the "purposes for which the request is made" nor the "identity of the requester" can determine whether the public has an interest in disclosure. *Reporters Comm.*, 489 U.S. at 771, 109 S.Ct. at 1480. Thus, the question of public interest must turn on "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' " *id.* at 772, 109 S.Ct. at 1481 (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976)), that is, to let the citizenry "know what their government is up to." *Id.* 489 U.S. at 773, 109 S.Ct. at 1481. Accordingly, "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Id.*

To illustrate these principles, the Court referenced its previous decision in *Department of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). There, the requester had asked for disciplinary hearing summaries maintained in the Air Force Academy's files. The summaries were provided but were redacted to protect the identities of participants in the disciplinary proceedings. The Court in *Reporters Committee* noted that the summaries in *Rose* "obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. *Reporters Comm.*, 489 U.S. at 773, 109 S.Ct. at 1482. However, the Court stated that the *names* of particular cadets were "irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code," *id.*, and had properly been withheld.

In *Reporters Committee*, the requester insisted that the public interest would be served by disclosure of the rap sheet because the individual whose criminal record was requested had allegedly had dealings with a corrupt Congressman and was an officer of a corporation with defense contracts. Noting that the rap sheet "would tell us nothing directly about the character of the *Congressman's* behavior" or "about the conduct of the *Department of Defense* (DOD) in awarding . . . contracts," the Court held that the alleged public interest in the release of the rap sheet was "not the type of interest protected by the FOIA." *Id.* at 774-75, 109 S.Ct. at 1482-83 (emphasis in original).

In *Ray*, the plaintiffs were undocumented aliens from Haiti who were seeking political asylum in the United States. They sought to prove that, as Haitians who immigrated illegally, they had a well-founded fear of persecution if they return to their homeland. The government asserted in response that any such

fear was unfounded. To support this assertion, the government relied in part on interviews conducted as a part of a State Department investigation designed to ascertain whether the Haitian government was living up to a commitment that indicted Haitians would not be subject to prosecution for illegal departure. An FOIA demand for all documents reflecting the interviews was honored by the State Department but the names of the interviewees and other identifying information were redacted. In *Ray*, the redacted information was withheld under Exemption 6,[2] but the case is nevertheless important for present purposes. The Supreme Court noted the similarity of the language in Exemption 6 and Exemption 7(C) and, indeed, pointed out that the government's burden is heavier under the former than the latter. Under Exemption 6, the government must show a "clearly unwarranted invasion of personal privacy" while under Exemption 7(C), only an "unwarranted invasion of personal privacy" must be shown.

After concluding that the refugees interviewed after their return to Haiti had a privacy interest in avoiding the disclosure of their names, the Court held that there was no relevant public interest in the disclosure of their identities:

> [T]he Court of Appeals properly recognized that the public interest in knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees is cognizable under FOIA. We are persuaded, however, that this public interest has

[2] Exemption 6 provides that the FOIA discolsure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

> been adequately served by disclosure of the redacted interview summaries and that disclosure of the unredacted documents would therefore constitute a clearly unwarranted invasion of the interviewees' privacy.
>
> The unredacted portions of the documents that have already been released to respondents inform the reader about the State Department's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees. The documents reveal how many returnees were interviewed, when the interviews took place, the contents of individual interviews, and details about the status of the interviewees. The addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation.

Ray, 112 S.Ct. at 549.

The Court in *Ray* acknowledged that the plaintiffs might be able to use the names to obtain from the interviewees information not contained in the State Department files that would be of help in their immigration proceedings. The Court declined the invitation of the government to adopt a *per se* rule that such "derivative use" of government information, i.e., the use of government information to discover helpful information not in the government's possession, could not serve a public interest protected by the FOIA. The Court held, however, that in the absence of reason to believe that the derivative use would produce information impugning the record impression of how the agency is performing its responsibilities, there was no relevant public interest to balance against competing privacy interests.

> The Government argues that such "derivative use" of requested documents is entirely beyond the purpose of the statute and that we should adopt a categorical rule entirely excluding the interest in such use from the process of balancing the public interest in disclosure against the interest in privacy. There is no need to adopt such a rigid rule to decide this case, however, because there is nothing in the record to suggest that a second series of interviews with the already-interviewed returnees would produce any relevant information that is not set forth in the documents that have already been produced. Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy. Accordingly, we need not address the question whether a "derivative use" theory would ever justify release of information about private individuals.
>
> We are also unmoved by respondents' asserted interest in ascertaining the veracity of the interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord government records and official conduct a presumption of legitimacy. If a totally unsupported suggestion that the interest in finding out whether government agents have been telling the truth justified disclosure of private materials, government agencies would have no defense against requests for production of private information.

Id. 112 S.Ct. at 549-50.

Before the Supreme Court's decision in *Ray*, the Court of Appeals for the Fifth Circuit applied the

teachings of *Reporters Committee* to a case presenting facts similar to those involved here. *Burge v. Eastburn*, 934 F.2d 577 (5th Cir.1991). In *Burge*, a state inmate sought FBI records containing the pretrial statements of persons who had testified at his murder trial. The inmate argued that there was a public interest in ensuring that he had received a fair and impartial adjudication of guilt or innocence at trial. The court recognized that there is, of course, a public interest in fair trials and perhaps in the contents of alleged statements to the FBI. However, the court, relying on *Reporters Committee*, rejected the contention that this was a public interest cognizable under the FOIA: "As in *Reporters Committee*, the requester in this case 'does not intend to discover anything about the conduct of the agency that has possession of the requested records.'" *Id.* at 580 (quoting *Reporters Comm.*, 489 U.S. at 773, 109 S.Ct. at 1481).

The rationale of the district court in the current dispute for its finding of a relevant public interest is inconsistent with the teachings of *Reporters Committee*, *Ray*, and *Burge*. There is undoubtedly a public interest in seeing that the guilty are convicted and that the innocent are not. However, whether that particular public interest is recognized by the FOIA is a separate question. Only when the information requested reflects directly upon the way that the agency conducts business has the requester placed something on the public interest side of the balancing equation. Because the information requested by Landano would shed no light on the way that the FBI fulfills its responsibilities, it "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Comm.*, 489 U.S. at 775, 109 S.Ct. at 1482.

Perhaps in recognition of the conflict between the district court's reasoning and that of these other decisions, Landano advances the additional argument that disclosure of the identities of those involved in the investigation would serve the public interest, as well as his own, because it may help him to show that information exculpatory to him and inculpatory to Forni was withheld from the defense. The public, he suggests, clearly has an interest in whether its law enforcement officers are engaging in this kind of misconduct.

Landano here paints with too broad a brush. Landano was convicted of murder in a state court. No federal prosecution ever took place in this case. Accordingly, any *Brady*-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors. To the contrary, the district court expressly found that there was no reason to believe there was any FBI wrongdoing involved in this case. Accordingly, we conclude that just as there is no FOIA-recognized public interest in discovering evidence in federal government files of a private party's violation of the law, *see Reporters Comm.*, 489 U.S. at 774, 109 S.Ct. at 1482, there is no FOIA-recognized public interest in discovering wrongdoing by a *state* agency.

3. *Balancing Private and Public Interests*

Because we have concluded that there is no public interest in the disclosure of the names here and that the individuals involved have at least some privacy interest in not having their names disclosed in connection with a criminal investigation, we conclude that the public interest asserted by Landano does not outweigh the privacy interests of others and,

accordingly, that disclosure of the names could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We find this case virtually on all fours with *Ray*. Like the Haitians in *Ray*, Landano seeks the withheld names for understandable reasons but for reasons that are extraneous to the purpose of the FOIA. Here as there, there is information in the file that could be used for the relevant purpose of evaluating the performance of the federal agency involved but that information has been disclosed and there is no reason to believe that the additional disclosure of the names would materially enhance anyone's ability to perform that evaluation. Finally, here as there, while the names would permit the requester to investigate "behind the government files" and gather non-government held information that might conceivably reflect adversely on the performance of the federal agency, there is nothing in the record suggesting misconduct on the part of that agency. For the reasons given in *Ray*, we conclude that the FBI's reliance on Exemption 7(C) is justified.

Because the district court did not apply the correct legal standard in granting summary judgment under Exemption 7(C), we will reverse that portion of the judgment ordering production of materials withheld in reliance on Exemption 7(C).

B. *Exemption 7(D)*

Exemption 7(D) exempts from the FOIA's disclosure requirements:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected

> to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution furnished on a confidential basis, . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . ., information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D). Here again, the "burden is on the agency to sustain its action under this Exemption." 5 U.S.C. § 552(a)(4)(B).

When a source that has supplied information in the course of a criminal investigation is "confidential," the agency may withhold not only the source's identity but also any information obtained from that source. Thus, unlike the materials withheld under Exemption 7(C), more is at stake here than just the identity of the FBI's sources of information; information provided by allegedly confidential sources may be withheld as well. Moreover, Exemption 7(D), unlike Exemption 7(C), does not require or allow any weighing of interests or any consideration of the contents of the information. If information was provided by a confidential source, the courts may not order disclosure of that information no matter how strong the public interest in disclosure. This reflects the fact that the purpose of Exemption 7(D) is to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information. It is not, like Exemption 7(C), designed to protect against unwarranted invasions of privacy.

The FBI's affidavit in this case identifies the specific pages withheld and redacted portions of specific pages produced and asserts that the information there set forth was compiled for law enforcement

purposes and, if produced, could reasonably be expected to disclose the identity of a confidential source or information furnished by such a source. It goes on to make the following representations with respect to the experience of the FBI in conducting interviews during a criminal investigation:

> During the course of most investigations, many individuals who are not established sources of the FBI, are interviewed under circumstances in which confidentiality is created. These individuals furnish information with either an expressed or implied understanding that their cooperation will not be needlessly divulged outside the FBI. Release of the identities of these confidential sources or the information they provided could subject these sources to negative public attention, and could inhibit future cooperation from these individuals or other individuals in possession of information of value to the FBI.
>
> * * * * *
>
> When Agents of the FBI conduct interviews, the FBI is seeking the assistance of the interviewee either to obtain facts that will result in the prosecution of the subject(s) of an investigation or to solicit the cooperation and assistance of the interviewee in a matter which may impact on the national security of the United States. In both cases, the FBI is asking individuals to become involved in situations in which others may lose substantial liberty or property interests; thus, the interviewee is placed in a position that could subject him or her to acts of reprisal, harassment, litigation, or an unnecessary amount of public attention. Individuals providing information to Federal agencies in furtherance of

a law enforcement activity must be free to do so without fear of possible reprisal should their identities or their information be disclosed to persons in whom they have not confided. This is not to say that any such reprisal is threatened or even likely in this case, but a general public policy requires that individuals must be free to furnish investigative information to the Government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names or information furnished will later be made public. Persons providing information, including witnesses to a crime who may expect to be called upon at a later time to testify in public at a judicial proceeding, should be secure in the knowledge that, absent the necessity of such public testimony with its attendant judicial restraints and protections, their assistance and their identities will be held in confidence. The fear of such exposure all too often inhibits the cooperation of otherwise conscientious citizens. These considerations have been met by the traditional willingness and ability of the FBI to assure persons interviewed that their identities would be protected.

App. at 175-76, 180-81.

The FBI's affidavit provides no other details with respect to the circumstances of any particular interview or source. Further, it provides no reference to the character of the information withheld or the nature of the investigation, although there is apparently no dispute that the investigation involved was that of the Snow homicide and the parties agree

on the general background from which this case arises.

The district court held that the FBI's affidavit was insufficient, as a matter of law, to satisfy the FBI's burden of establishing that the information came from a "confidential source."[3] In challenging this conclusion, the FBI first refers us to legislative history indicating that a "confidential source" includes not only a person who has received an express assurance of confidentiality, but also a person who has provided information "in circumstances from which such an assurance can reasonably be inferred." The FBI then asserts that an affidavit like the one it has here filed will permit, and ordinarily should occasion, an inference that the information came from a confidential source. It cites cases from no less than six courts of appeals for the proposition that "promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." *See Dow Jones & Co. v. United States Dep't of Justice*, 917 F.2d 571, 576 (D.C.Cir.1990); *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C.Cir.1990); *Keys v. United States Dep't of Justice*, 830 F.2d 337, 345 (D.C.Cir. 1987); *Donovan v. FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond v. FBI*, 707 F.2d 75, 78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004, 104 S.Ct. 995,

[3] The district court stated, *inter alia*, that the FBI had failed to provide "case specific reasons for non-disclosure" and that such reasons were required as a matter of law to sustain its burden. Because the FBI did represent that the specific information in the files here at issue was received in FBI interviews and thus came within the scope of Exemption 7(D), we take this to mean the district court believed some information concerning the circumstances of such interviews or sources was required.

79 L.Ed.2d 228 (1984); *Pope v. United States*, 599 F.2d 1388, 1386-87 (5th Cir.1979); *Ingle v. United States Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Brant Constr. Co. v. United States Envtl. Protection Agency*, 778 F.2d 1258, 1263 (7th Cir. 1985); *Miller v. Bell*, 661 F.2d 623, 627 (7th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 484 (1982); *KTVY-TV v. United States*, 919 F.2d 1465, 1470-71 (10th Cir.1990); *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1517-18 (10th Cir.1984). The district court's holding and this response of the FBI pose the issue for decision under Exemption 7(D).

We turn initially to the statutory language and legislative history. The legislative history indicates that the term "confidential source" includes more than undercover informers and undercover agents. The Conference Committee opted for the term "confidential source" over the term "informer" that was contained in the Senate version of the bill. This change was designed to make clear that a confidential source includes not only a paid informer but also a "citizen volunteer" who has "provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred." S.Rep. No. 1200, 93rd Cong., 2d Sess. 13, *reprinted in* 1974 U.S.Code Cong. & Ad. News 6267, 6291 (emphasis added). There is no direct evidence in the legislative history, however, as to whether Congress intended that every person interviewed pursuant to a criminal investigation was to be considered—at least in the absence of contrary evidence—a "confidential source."

The 1986 amendments to FOIA were adopted with almost no legislative background. Until 1986, Exemption 7(D) covered the production of records that "would disclose" the identity of a confidential source or information provided by a confidential source. The 1986 amendments changed the language so that the Exemption now covers the production of records or information that "could reasonably be expected to disclose" the identity of a confidential source or information provided by a confidential source. This change was intended to lighten the agency's burden in invoking Exemption 7, *Reporters Committee*, 489 U.S. at 756 n. 9, 109 S.Ct. at 1473 n. 9, and was consistent with a categorical approach at least with respect to Exemption 7(C) cases. *Id.* at 777-78 n. 22, 109 S.Ct. at 1484 n. 22. However, the amendments did not define "confidential source" with any greater precision than had been done earlier.

At times, the FBI characterizes its position as a contention that a presumption of an assurance of confidentiality arises as a matter of law whenever information is shown to come from an FBI interview in the course of a criminal investigation. Understandably, Landano responds that such a presumption is at odds with Congress's determination in the FOIA that the burden of establishing entitlement to an exemption rests upon the government. We believe this characterization of the FBI's position misstates the issue before us.

In the legislative history, Congress has supplied a definition of a confidential source. Included within that definition are persons who, while not the beneficiaries of an express assurance of confidentiality, nevertheless spoke under circumstances in which such an assurance can reasonably be inferred. If a gov-

ernment agency files an affidavit reciting all of the surrounding circumstances of a particular interview and the district court believes a reasonable interviewee would feel so assured under such circumstances, a conclusion that the interviewee was a confidential source is clearly warranted. The issue presented by the district court's decision in this case is how much less than such a showing will, in the absence of contrary evidence, permit such a conclusion. In other words, what is the "minimum evidentiary showing" that will permit an inference that the interviewee probably had a reasonable expectation of confidentiality? We thus view the issue as one of what constitutes a *prima facie* case of "confidential source." If the "minimum evidentiary showing" is enough to permit a rational inference that the person involved more likely than not falls within Congress's definition of "confidential source," the agency cannot be said to have gotten unfair assistance, in the form of a legal presumption, in meeting its statutory burden.

In determining how much is enough, it is helpful to first determine what Congress had in mind when it referred to an "assurance of confidentiality." We believe it clearly could not have been thinking of an assurance that the information supplied would not be disclosed beyond the FBI. Because an absolute assurance against use would be inconsistent with the government's obligations under *Brady* and the Federal Rules of Criminal Procedure and would, in any event, render the information virtually worthless to the FBI, such assurances must be exceedingly rare, if indeed they exist at all. We are therefore confident that Congress had a less sweeping assurance in mind. Rather, it seems far more likely that Congress

had in mind an assurance that the FBI would not directly or indirectly disclose the cooperation of the interviewee with the investigation unless such a disclosure is determined by the FBI to be important to the success of its law enforcement objective.

The issue for decision is thus whether the fact that the source supplied information to the FBI in the course of a criminal investigation is alone sufficient to support an inference that the source probably had a reasonable expectation that no unnecessary disclosure of his or her cooperation would occur. This, we believe, is a close question.[4] After all, the FBI is generally known to involve itself only in significant criminal matters and this means that in any FBI investigation, there are likely to be persons who have motives for resenting those who cooperate with it.[5]

---

[4] If one were to answer this question in the affirmative, one might still insist on a more specific record than we have before us in this case. That record, for example, does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought. While we can appreciate that insurmountable recordkeeping problems might be created by a requirement that the overall circumstances of each interview be included in the FBI affidavit, it is not apparent to us why some representation could not be made on this score based on the agents' notes or consistent FBI practice.

[5] Moreover, while the FBI has made a deliberate decision in this case to rely solely on the fact that the withheld information is the product of FBI interviews, the issue becomes even closer when one adds to the equation other background facts which do not concern what went on at the time of a particular interview. We know, for example, that the criminal investigation involved in this instance was one concerning the shooting of a policeman and that the crime and investigation received a great deal of publicity, including media reports that a motorcycle gang was suspected of having been involved. In

On the other hand, we acknowledge that there are undoubtedly many routine FBI interviews in the course of criminal investigations that are unlikely to give rise to similar apprehensions on the part of the interviewee. In light of the disparate nature of FBI interviews, a record like the one before us arguably permits nothing more than speculation as to whether a particular interview was conducted on a confidential basis.

Our panel need not resolve this difficult issue here, however, because we do not write on a clean slate. In *Lame v. United States Department of Justice*, 654 F.2d 917, 929 (3d Cir.1981) (*"Lame I"*), we were confronted with a situation virtually identical to that now before us. Because there have been no intervening teachings of the Supreme Court that require our departure from that precedent, our disposition of this case must be the same as the one there reached. Internal Operating Procedure 9.1.

In *Lame*, the requester sought FBI 302 forms for named individuals whose identities he had discovered from public records of a much publicized federal prosecution of two members of the Pennsylvania legislature. A 302 form is used by the FBI to record the substance of an interview with a potential witness. The FBI refused even to confirm or deny the existence of the designated 302s because confirmation without more would disclose that the named individuals had cooperated with the FBI. The FBI first filed an affidavit by a special agent who "asserted that in-

---

this context, one might more readily infer that the source would not have gotten involved absent an assurance that his cooperation would not be indiscriminately disclosed. As we shall see, this background information does not distinguish our case from the *Lame* case where well-known and powerful people were the subjects of the investigation.

dividuals who furnish information to the FBI do so with the understanding that the information given by them and their relationship with the agency will be held in the strictest confidence." *Id.* at 925. The FBI later submitted an *in camera* affidavit and representative 302s, asserting, *inter alia*, that in order to obtain the interviews "assurance, either express or implied, had been given to the interviewees that there would be no indiscriminate release to the public of their identities." *Id.* at 920.

This court agreed with the FBI that it was justified in resorting to an *in camera* affidavit and indicated that there would be no problem with the FBI's position if its *in camera* affidavit had been sufficiently detailed. We concluded, however, that the *in camera* affidavit was insufficient for purposes of Exemption 7(D):

> Whether there is an expressed or an implied assurance of confidentiality is a question of fact to be determined in regard to each source.
>
> * * * * *
>
> [T]he Section 7(D) confidential source exemption requires that an assurance of confidentiality be found for each source. Thus, the district court, in order to find that such assurances, express or implied, were given, had to have been furnished with detailed explanations relating to each alleged confidential source.

Id. at 923, 928.

In *Lame*, we reached our conclusion regarding Exemption 7(D) reluctantly, voicing our dual concerns that our holding (1) would unduly tax limited FBI resources and (2) might discourage future cooperation with the FBI. We concluded, however, that

it was for Congress, rather than this court, to "attempt to accommodate the[se] concerns." *Id.* at 929.

For reasons that we have heretofore explained, we find no necessary inconsistency between *Lame's* insistence that the existence of an implied assurance of confidentiality is a question of fact to be determined for each source and the results reached by the numerous courts of appeals that have inferred an assurance of confidentiality from the fact that information was obtained in an FBI interview during a criminal investigation. Nevertheless, we believe *Lame*, fairly read, contemplates a showing by the government of the particular circumstances of an interview or source. Clearly the record before us is indistinguishable from the record before the court in *Lame*, and the *Lame* court held the record before it to be insufficient to support a finding of confidentiality. Accordingly, we conclude that *Lame* requires this panel to affirm the judgment of the district court with respect to Exemption 7(D).

The FBI argues that given *Reporters Committee*, we are no longer bound by *Lame*. First, it contends that the Supreme Court found that the 1986 FOIA amendment reflects a general congressional desire to ease the government's burden under Exemption 7. Second, the FBI maintains that the Supreme Court intended the categorization process it adopted for Exemption 7(C) cases to be utilized in the context of other exemptions. While there is language in *Reporters Committee* that may be a harbinger of a general easing of the government's FOIA burden, there is nothing of sufficiently direct import for Exemption 7(D) jurisprudence to warrant this panel's ignoring the holding of the panel in *Lame*.

Before the 1986 amendment, Exemption 7(D) provided that an agency could withhold information

compiled for law enforcement purposes if production "would disclose the identity of a confidential source." The amendment substituted the phrase "could reasonably be expected to" for the word "would." This change speaks to the degree of risk of confidential source disclosure Congress was willing to accept. It says nothing about what Congress means by "confidential source."

The Supreme Court's approval of a categorical approach to an Exemption 7(C) case similarly tells us nothing new about the meaning of "confidential source" under Exemption 7(D). Prior to *Reporters Committee*, the understanding had been that the weighing of privacy interests and public interest required by Exemption 7(C) was to be done on a case-by-case basis. In that case, the Supreme Court indicated that where it could be said of a category of documents, as of FBI rap sheets, that "the balance characteristically tips in one direction," case-by-case balancing is not required and documents within that category may be declared exempt. *Reporters Comm.*, 489 U.S. at 776, 109 S.Ct. at 1483. While the Court's opinion suggests that a similar categorical approach may appropriately be substituted for "case by case balancing" under exemptions other than 7(C), determining what constitutes a "confidential source" and what constitutes a *prima facie* showing of a "confidential source" does not involve "case by case balancing."

Finally, the FBI argues that we should sustain its position because it tendered its entire files to the district court for *in camera* inspection. We decline to hold that the government can sustain its burden in this manner. While it is clearly appropriate for an agency to so tender its files, it cannot through such a tactic require the court to do its homework for it.

In *Lame v. United States Department of Justice*, 767 F.2d 66 (3rd Cir.1985) *Lame II*, the government's position was sustained because it submitted not only the 302 forms for *in camera* inspection but also an *in camera* affidavit providing the court with the details found wanting in *Lame I*.[6]

III.

In the ten years since this court decided *Lame I*, six other courts of appeals have reached decisions that are in tension, if not in direct conflict, with the view we there took of what constitutes a *prima facie* showing under Exemption 7(D). Nevertheless, we find this case indistinguishable from *Lame I*, and as a panel, are not at liberty to depart from prior circuit precedent. Accordingly, we will affirm that portion of the district court's judgment which directs production of material withheld solely on the basis of Exemption 7(D). We will reverse that portion of the judgment, however, to the extent it orders production of material withheld in reliance on Exemption 7(C). On remand, the district court will enter a new judgment implementing the decisions we have here reached.

---

[6] The FBI urges that if we find *Lame I* to be controlling, we nevertheless hold that the district court erred in not giving the FBI a further opportunity to file *in camera* affidavits in an attempt to justify its position. Particularly in light of the instruction provided by the opinion in *Lame I* and *II*, we cannot say the district court abused its discretion in ordering production without giving the FBI yet another chance.

APPENDIX B

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civ. A. No. 90-1953

VINCENT JAMES LANDANO, PLAINTIFF

v.

U.S. DEPT. OF JUSTICE, ET AL., DEFENDANTS

Nov. 29, 1990

OPINION

SAROKIN, District Judge.

Plaintiff, Vincent James Landano moves, pursuant to Fed.R.Civ.P. 56, for summary judgment in his action to compel the Federal Bureau of Investigation ("FBI") to release without redactions FBI information he requested pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The FBI cross-moves for summary judgment against plaintiff, claiming that its decision not to release certain information to plaintiff, and to release with redactions other requested information comports with certain statutory exceptions to FOIA. For the reasons given below, this court declares plaintiff's motion for summary judgment moot, partially grants defendant's cross-motion for summary judgment and partially

denies defendant's cross-motion for summary judgment.

INTRODUCTION

By promulgating the Freedom of Information Act ("FOIA"), Congress sought to "open agency action to the light of public scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1975). It did not intend to provide individual citizens with information about their fellow citizens for their own self-interested use. Yet the mere fact that an applicant possesses a substantial self-interest in the information does not disqualify him or her from requesting that information.

In this case, plaintiff claims that the FBI maintains in its files information which exculpates him from a murder for which he was convicted and may inculpate someone else; and that such information was systematically withheld from him and his counsel during his prosecution. Plaintiff's right to information that establishes his innocence and the public's interest in assuring that the innocent are not wrongfully convicted and confined furthers the policy concerns which engendered the statute. Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might have lead to petitioner's acquittal, such person and the public should be entitled to examine that information and the reasons and policies surrounding its concealment.

The court believes that the privacy interests and agency concerns expressed by the government can be protected by appropriate redactions, while petitioner and the public are afforded the opportunity for the scrutiny which the statute contemplates. The court does not mean to suggest that following every conviction a criminal defendant shall be entitled to review the entire investigative file. A substantial showing must be made, as has been made here, demonstrating a pattern of conduct which has severely prejudiced the plaintiff's rights, and thus the fairness and integrity of the criminal justice system itself.

The court rejects the government's offer for an *in camera* inspection by the court. Despite the court's familiarity with this matter and the contentions of plaintiff, the court is convinced that no impartial reviewer can examine these files with the same knowledge, intensity, and interest as plaintiff and his counsel. Matters of substantial significance could easily elude the court or anyone designated by the court to perform this task.

Finally, the court is concerned at the strident position taken by the United States Attorney in this matter, gratuitously disparaging the plaintiff's protestations of innocence.[1] The court makes no finding of wrongdoing on the part of the FBI in this matter, and the government is justified, and indeed required,

---

[1] In belittling plaintiff's argument in this case, the government's brief in favor of its cross-motion for summary judgment states:

> The United States is as concerned about the interests of justice as is plaintiff, and defendants would not thwart production of documents if the law did not absolutely preclude production of documents sought by plaintiff, *especially in the extremely unlikely event plaintiff is innocent of the charges of which he was convicted. However, we cannot help but wonder, as should this court, about plaintiff's credibility in light of his recent false assertions of FBI wrongdoing . . . which cannot help but color one's view of plaintiff's credibility on his claims of innocence as well.*
>
> U.S. Government's brief in favor of its Cross-Motion for Summary Judgment, at 23.

to defend the agency and the integrity of its files. However, if there is evidence existing in those files which proves or tends to prove Mr. Landano's innocence, the government should be volunteering it rather than resisting its disclosure. Law enforcement agencies have as much of a duty to protect, and if necessary, free the innocent, as they do to convict and punish the guilty. The resistance to disclosure of information in this matter is not a testament to a system intent on seeking the truth and dispensing justice.

BACKGROUND

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey. During the robbery, one of the gunmen shot and killed Newark Police Officer, John Snow. A Hudson County grand jury indicted plaintiff and three other men, Allen Roller, Victor Forni, and Bruce Reen, for felony murder and other crimes stemming from the robbery, and on May 17, 1977, plaintiff was convicted of felony murder and other crimes associated with the robbery.

During the thirteen years since his conviction, plaintiff has maintained that he is innocent of the charges, and that the Hudson County prosecutor withheld significant exculpatory evidence from him and his counsel in an effort to convict him for a crime which he did not commit. After Raymond Portas, a key witness for the prosecution, recanted his trial testimony in which he originally stated that he saw plaintiff driving the getaway car used in the robbery, plaintiff filed a petition for habeas corpus with this court, claiming that his due process rights to a fair trial were infringed by the admission of Portas' identification testimony. After conducting an evidentiary hearing, this court was convinced that Portas' recantation was believable. However, it reluctantly denied plaintiff's petition, recognizing that it was bound by the state trial court's prior finding that Portas' recantation was incredible. *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J.1987), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. den.*, 489 U.S. 1014, 109 S.Ct. 1127, 103 L.Ed.2d 189 (1989). On June 27, 1989, however, this court issued a conditional writ of habeas corpus in response to plaintiff's motion for relief from its prior judgment, pursuant to Fed.R. Civ.P. 60(b), basing the ruling on its finding that the state prosecutor had suppressed exculpatory information during plaintiff's criminal trial. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J.1989). The Court of Appeals for the Third Circuit reversed this court's decision, holding that plaintiff had not exhausted his state law remedies with respect to that particular claim for post-conviction relief. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.1990), *cert. den.*, —— U.S. ——, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990).

On September 30, 1988, plaintiff sent a letter to the FBI's Newark Field Office requesting all FBI information pertaining to the murder of Police Officer Snow (FOIA Request No. 310265, "Snow Request"). On May 8, 1990, 19 months later, the FBI responded by releasing to plaintiff redacted portions of its Snow investigative file. The FBI provided plaintiff with 324 pages of the 726 page file. Names and substantial passages were deleted from many of the pages supplied.

On January 10, 1989, plaintiff sent a letter to the FBI requesting its file on Victor Forni (FOIA Request No. 306424, "Forni Request"). On June 22, 1990 the Department of Justice ("DOJ") informed plaintiff's attorney that the FBI was precluded from

fulfilling plaintiff's Forni Request under the Privacy Act, 5 U.S.C. § 552a(b)(2) and FOIA, 5 U.S.C. § 552(b)(7)(C), and that plaintiff could not receive the requested file unless Mr. Forni authorized the release of such information.

Plaintiff appealed to the DOJ both the FBI's decision to send him a redacted version of its Snow file and its decision not to send him its Forni file. Because the DOJ has affirmed both FOIA request decisions, this court now has jurisdiction over this dispute. Since oral argument in this case, Victor Forni has authorized the release of his FBI file to plaintiff, rendering the controversy concerning the Forni request moot. This court will thus only rule upon plaintiff's Snow request in this opinion.

DISCUSSION

In order for a party to prevail on its motion for summary judgment, it must show that there are no genuine issues of material fact and that, viewing the facts in the light most favorable to the non-moving party, it will prevail on its claims as a matter of law. Fed.R.Civ.P. 56; *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 83 (3d Cir.1987). There are no genuine issues of material fact in this case. Plaintiff and defendant agree that the FBI sent plaintiff a redacted version of its Snow file. While defendant and plaintiff disagree as to the extent of the FBI's involvement in the withholding of exculpatory evidence from plaintiff at his criminal trial, both parties acknowledge that the FBI was involved in the investigation which resulted in plaintiff's prosecution and conviction.

Given the dearth of factual disputes in this matter, the threshold question before this court is whether

defendant has sufficiently justified its redactions and deletions of the Snow file. When adjudicating the withholding of information under FOIA, district courts must determine the matter *de novo*, requiring the defendant to bear the burden of proving that the information not released by defendant comes within a statutory exemption. § 552(a)(4)(B); *King v. Dept. of Justice*, 830 F.2d 210, 217 (D.C. Cir.1987). Courts reviewing FOIA requests must also give effect to the statute's strong presumption in favor of releasing requested documents. *I.E.B.W. Local No. 5 v. U.S. Dept. of HUD*, 852 F.2d 87, 89 (3d Cir.1988).

In *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir.1973), *cert. den.*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), the Court of Appeals for the District of Columbia required federal agencies to describe and index withheld information, in an effort to avoid shifting the burden of proof in FOIA request cases from defendant to plaintiff. A *Vaughn* index describes with particularity the withheld information and identifies the FOIA exceptions that apply to that information, insuring that the plaintiff does not have to argue for the release of withheld information without knowing generally its nature and relevance to the professed FOIA exemptions. As the court in *King v. U.S. Dept. of Justice*, 830 F.2d 210 (D.C. Cir.1987) stated, "when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Id.* at 219. In its supporting affidavit, defendant enumerated those FOIA exemptions that it contends cover the withheld material in this case. Superneau Aff., at 13. Where whole pages were withheld from plaintiff, defendant

supplied an index describing in general terms the withheld material and stipulating the applicable FOIA exceptions. Where material was deleted on a released page, defendant specified what it considered the appropriate FOIA exception alongside the indicated deletion.

In its affidavit, defendant claimed that the redactions and deletions of the Snow file are permissible under exemptions 552(b)(2), (b)(6), (b)(7)(C), and (b)(7)(D) of FOIA. This court will now examine defendant's contentions respecting these exemptions.

Section 552(b)(2) exempts from mandatory disclosure records "related solely to the internal practices of an agency." The FBI asserted exemption (b)(2) to withhold symbol numbers of confidential informants. The withholding of symbol numbers and file numbers has been upheld as a legitimate application of exemption (b)(2). *Branch v. FBI*, 658 F.Supp. 204, 208 (D.D.C.1987). Because this court agrees that the interests weigh in favor of withholding the symbol numbers of confidential informants in this case, and that little public interest in the internal symbol and file numbers of the FBI exists, it affirms the FBI's decision to do so.

Section 552(b)(6) allows the government to withhold information about individuals in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Defendant contends that it withheld individual criminal history or rap sheet information pursuant to (b)(6), labeling such information "similar files" under the exemption. In light of the Supreme Court's ruling in *Dept. of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103

L.Ed.2d 774 (1989), that rap sheet information can be withheld pursuant to exemption (b)(7)(C), this court considers as protected from disclosure any rap sheet information in the Snow file. However, this court considers such information protected only under (b)(7)(C) and not, as asserted by defendant, under (b)(6). If defendant withheld any other information pursuant to (b)(6), it must specify its nature to this court so that it can determine by proper balancing whether such information was properly withheld under that exemption.

Section (b)(7)(C) allows the government to withhold certain personal information in law enforcement records. The statute sets out the exemption as follows:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

In reliance on exemption 7(C), the FBI withheld the names of special agents, FBI support employees, police officers, and other third parties to the Snow investigation, including witnesses. It also withheld the initials of FBI employees.

To satisfy the requirements for exemption 7(C), defendant must show that the withheld information consists of "law enforcement records", and that an invasion of privacy could reasonably result from its disclosure. In this instance, records responsive to plaintiff's FOIA request were compiled during the investigation of a bank robbery involving the death of an individual. The FBI was authorized to compile the information under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. In view of defend-

ant's authority to gather the information, this court finds that it was compiled for law enforcement purposes.

The second requirement in applying exemption 7(C) is to determine whether disclosure of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The legislative history of exemption (7) demonstrates a congressional intent to protect the privacy rights of persons other than the subject of the investigation. As its author, Senator Hart explained.

> [It] is intended to protect the privacy of any person who is mentioned in the requested files, and not only the person who is the subject of the investigation. Cong.Rec. 17033 (May 30, 1974).

Where an individual mentioned in the withheld information has a cognizable interest in privacy, the court must determine whether to release that information by "weigh[ing] . . . the public benefit which would result from the disclosure against the privacy interest and the extent to which it is invaded." *Patterson by Patterson v. F.B.I.*, 893 F.2d 595, 601 (3rd Cir.), *cert. denied*, *Patterson v. F.B.I.*, —— U.S. ——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990), (quoting *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir.1985)).

In FOIA request cases, certain types of information may, as a matter of law, be withheld from an applicant under what the Supreme Court has called "categorical balancing". In *Reporter's Committee*, the Supreme Court sanctioned the practice of categorical balancing under exemption 7(C) and other exemptions while holding that all rap sheet information not requested by its subject is exempt from FOIA disclosure under exemption 7(C). "[F]or an

appropriate class of law-enforcement records or information", stated the court, "a categorical balance may be undertaken." *Reporter's Committee*, supra 109 S.Ct. at 1484. "Categorical decisions may be appropriate and individual circumstances disregarded", declared the court, "when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* 109 S.Ct. at 1483. In delineating the requirements for categorical balancing, the Supreme Court stated:

> If it is always true that the damage to a private citizen's privacy interest from a rap sheet's production outweighs the FOIA-based public value of such disclosure, then it is perfectly appropriate to conclude as a categorical matter that production of such [rap sheets] could reasonably be expected to constitute an unwarranted invasion of personal privacy. *Id.* 109 S.Ct. at 1484.

Such guidelines compel this court to uphold defendant's withholding of the names of FBI informants or FBI undercover agents. Because their names are not made available to the public through other channels, it is reasonable to expect that such individuals would have a stronger privacy interest than others whose names may be disclosed irrespective of any FOIA request. Moreover, policy concerns dictate that persons who have supplied information to investigative personnel in confidence should not have to risk harassment or retaliation as a result of their cooperation. *See Dow Jones & Company, Inc. v. Dept. of Justice*, 908 F.2d 1006, 1011 (D.C.Cir. 1990). Disclosing the names of FBI undercover personnel and informants could subject such persons to retaliation and other dangers unique to the work they perform for the FBI. *See King v. U.S. Dept. of*

Justice, 830 F.2d 210, 232-33 (D.C.Cir.1987). In acordance with the requirements of *Reporter's Committee*, this court finds that the disclosure of the names of FBI undercover agents or FBI informants could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that the FOIA-based public value in the information, though significant, will generally not outweigh the damage to the privacy of the individuals mentioned in the information. This court therefor upholds defendant's withholding of such information. However, even though, presumptively, undercover agents and informants are entitled to protection, a plaintiff may establish that the need for the disclosure of such information outweighs the privacy rights of such individuals. The burden in such instances should be cast upon the plaintiff to establish that such invasion of personal privacy is warranted by the particular circumstances presented. *See Dow Jones*, 908 F.2d at 1011.[2]

This court does not accept defendant's contention that the names of witnesses or other FBI and law enforcement personnel should be withheld from plaintiff under exemption 7(C). The identities of many of these persons are routinely made known to the public through other channels, the specter of harassment

[2] This court agrees with the D.C. Circuit that a presumption of non-disclosure should exist with respect to the identities of confidential FBI informants. However, this court does not consider such presumption "irrebuttable", in practical terms, as the D.C. Circuit has characterized it in the *Dow Jones* opinion. Unlike the court in *Dow Jones*, this court holds that a court may consider proofs other than evidence that the informant did not manifest a regard for confidentiality during the initial disclosure of information as evidence that could overcome the presumption against disclosure.

or retaliation does not seem as eminent for these individuals, and nothing presented by defendant in this matter convinces the court that they as a group possess privacy interests compelling enough to satisfy the standard for categorical nondisclosure announced in *Reporter's Committee*. For this category of information, the burden should remain with the government to establish that disclosure is an unwarranted invasion of personal privacy.

Having rejected defendant's assertion that the names and initials of FBI and law enforcement personnel other than undercover FBI personnel and FBI informants may be categorically withheld under *Reporter's Committee*'s categorical balancing standard, this court must now determine whether the circumstances and exigencies of the Snow investigation compel non-disclosure of such information in this particular case. In setting forth the considerations of this contextualized, as opposed to categorical, balancing approach in *Stern v. F.B.I.*, 737 F.2d 84 (D.C. Cir.1984), the Court of Appeals for the D.C. Circuit, a court highly experienced in FOIA request cases, declared that the 7(C) balance:

> must be applied to the specific facts of each case. Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored. A particular record may be protected in one set of circumstances, but not in others. *Id.* at 91 (citing *Bast v. Dept. of Justice*, 665 F.2d 1251, 1254 (D.C.Cir.1981).

In *Keys v. U.S. Dept. of Justice*, 830 F.2d 337 (D.C. Cir.1987), the D.C. Circuit opined that "[a] com-

partmentalization is 'rigid' within the meaning of *Stern* only to the extent that it ignores factors that are material, or gives undue weight to factors that are of little or no relevance." *Id.* at 347.

Adopting the spirit of these cases, this court finds that defendant has not proffered any evidence to this court that justifies the withholding of the names of the remaining law enforcement personnel or witnesses cited in the Snow file. Defendant's affidavit covers generally the potential dangers in releasing the names of FBI support personnel and police officers, and this court acknowledges that in many instances, withholding such information may be justified. Yet defendant offers nothing to convince the court that the dangers involved in releasing such information exist in this particular case, particularly in view of the approximately 14 years which has elapsed since the underlying investigation. With respect to those witnesses or law enforcement personnel not covered by categorical balancing, defendant does not distinguish between persons who would be endangered by disclosure and those who would not. Defendant does not consider the effect that the passage of time has had on the privacy interests of the named individuals, and does not indicate whether persons initially thought to have been covered by exemption 7(C) have died or have already been exposed in other fora to the public.

Under section (b)(7)(D), records or information are properly exempted from disclosure when such disclosure:

> . . . could reasonably be expected to disclose the identity of a confidential source, . . . and in the case of a record or information complied by a criminal law enforcement authority in the course

> of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . .

The government claimed the exemption under section (b)(7)(D) to protect sources of information identified in its bank robbery investigation, including information obtained from non-federal law enforcement agencies, information that the FBI believed could reasonably be expected to disclose the identity of an FBI source, information from confidential FBI sources, and certain FBI symbol source number information. As mentioned above, this court finds that FBI symbol source numbers are properly protected under (b)(2), See *Branch*, 658 F.Supp., *supra* at 208. For many of the reasons given for withholding identifying information about certain confidential witnesses and FBI undercover agents, this court also holds that the categorical balancing approach announced in *Reporter's Committee* allows the withholding of bank robbery investigation information that could reasonably be expected to disclose the identity of a confidential FBI source or undercover agent. With respect to all other information withheld by defendant under (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by defendant. Accordingly, any other information withheld by the government under exemption 7(D) must be released to plaintiff.

As stated above, in assessing defendant's reasons for withholding the redacted information, this court has not reviewed the unredacted Snow file *in camera*, although it possesses the powers to do so under § 552 (a)(4)(B). This court realizes that the *in camera* review provision of FOIA furthers Congress' obvi-

ous interest in insuring that government agencies conduct "good faith" responses to FOIA requests and do not unfairly withhold information from the public. See *Patterson*, 893 F.2d at 600. Yet cases have acknowledged that "in the ordinary case, a *Vaughn* index correlating justifications for non-disclosure with the particular portions of the documents requested will generally suffice to narrow the disputed issues and permit a reasoned disposition by the district court." *Patterson, supra*, at 599; *Lame v. U.S. Dept. of Justice*, 654 F.2d 917, 922 (3d Cir.1981). It is thus reasonable for a court to expect a *Vaughn* index and accompanying affidavit to set forth the ways in which the statutory exemptions apply to the particular FOIA request at issue. District courts should not have to conduct an *in camera* review of withheld information every time they need to determine whether the circumstances of the particular case warrant the government's exercise of a FOIA exemption. Furthermore, the infirmities of an *in camera* review discussed above renders its availability insufficient to satisfy the needs and policies of the statute in many, if not most, cases.

CONCLUSION

Under the FOIA, the public's right to disclosure of information has been broadly defined and its exemptions narrowly construed. Doubts are to be resolved in favor of disclosure. The basic purpose of the statute is to protect the people's right to obtain information about their government and to expose to the light of day agency conduct and practices. Those goals must be balanced against needs in certain areas to protect confidential information and individual privacy rights.

The need for privacy is at its highest pinnacle in connection with criminal investigations. Those who come forward with information and those against whom the information is submitted are entitled to a high threshold of protection. That threshold can be exceeded, however, when the need for disclosure exceeds the need for privacy—where the public interest in obtaining information outweighs the private or agency interest in concealing it. In balancing those interests, it is difficult to envision that information which might serve to free a person wrongly convicted of murder should remain concealed in order to protect someone's identity or right of privacy.

For the foregoing reasons, this court grants defendant's cross-motion for summary judgment as to all FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap sheet information mentioned in defendant's Snow file, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. This court considers such information properly protected in this instance under the proffered exemptions, subject to a particularized showing that such protection is unwarranted. With respect to other information withheld by defendant, including the names of witnesses, FBI support personnel, FBI personnel that do not work undercover, and other law enforcement personnel not covered by this court's interpretation of categorical balancing, this court concludes that the govenment failed to proffer evidence that supports the withholding of such information under the exemptions to FOIA in this particular case. As to these categories, it is the burden of the government to establish that such disclosure constitutes an unwarranted invasion of privacy.

APPENDIX C

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Civ. A. No. 90-1953

VINCENT JAMES LANDANO, PLAINTIFF

v.

U.S. DEPT. OF JUSTICE, ET AL., DEFENDANTS

Feb. 28, 1991

AMENDED OPINION

SAROKIN, District Judge.

Defendant Federal Bureau of Investigation ("FBI") moves, pursuant to Fed.R.Civ.P. 59(e), for reconsideration and/or clarification of the court's November 29, 1990 decision and December 13, 1990 order. Defendant also moves for a stay of the court's December 13, 1990 order pending appeal of the court's decision or, in the alternative, for an extension of the time set for the production of documents. For the reasons which follow, this court grants defendant's motion for reconsideration and clarifies its previous opinion as follows:

INTRODUCTION

On its motion for reconsideration, the government presents the following syllogism: (1) all information conveyed to the FBI during the course of a

criminal investigation is furnished pursuant to an express or implied promise of confidentiality; (2) based upon such express or implied promise neither the source nor the content of 'he information received from such source may be disclosed; (3) therefore, all information gathered by the FBI from any source during a criminal investigation is exempt from disclosure under exemption 7(D) of FOIA. Neither the statute nor any binding judicial interpretation of it supports this contention.

A person is a confidential source if she or he provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality could be reasonably inferred. *See Lame v. United States Dept. of Justice*, 654 F.2d 917, 923 (3d Cir.1981). Whether such an express or implied assurance of confidentiality was made is a question of fact to be determined in regard to each source. In this Circuit, the *per se* rule or presumption suggested by the government does not exist. To find as the government contends would totally eviscerate the statute and its policy and purpose. Only if there is a finding supported by competent evidence that a source is confidential does that source and all information provided by it become exempt from the disclosure requirement of FOIA. *See Lame, id.* The Court is entitled to receive and review detailed information as to each alleged confidential source. The blanket and generic exemption sought by the government is without support and defeats the policy of public exposure which prompted the statute in the first instance.

As to the judicial balancing required under exemption 7(C), the government suggests that "clearing one wrongly convicted" is not of sufficient public interest to even consider whether it warrants an inva-

sion of an informant's right of privacy. By so arguing, the government continues to misconstrue and trivialize what this court has found to be a substantial public interest. As stated in this court's earlier opinion:

> Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might have lead to petitioner's acquittal, such person and the public should be entitled to examine that information *and the reasons and policies surrounding its concealment. Landano v. Dept. of Justice*, 751 F.Supp. 502, 503 (1990) (emphasis added).

The government may believe that a policy of concealing exculpatory information, resulting in wrongful convictions is not a matter of public interest and concern. If so, all the more reason for the subject statute and the need to see beyond the government's representations and permit the public to form its own judgments.

Lastly, the court expresses its concern over the potential inconsistencies which could result from the differing approaches for determining whether information may be withheld under exemptions 7(C) or 7(D). Under the current case law, a court may determine that the FOIA-based public interest in disclosure of information outweighs the privacy interests of an individual informant and the extent to which that informant's privacy would be invaded, thus allowing disclosure under exemption 7(C). However, if the informant was a confidential source, the court may be required to uphold the government's nondisclosure of that same information under exemption 7(D). These potential inconsistencies may run

contrary to FOIA's overall policy of broad public disclosure.

BACKGROUND

This dispute arises out of two requests for FBI documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, plaintiff's September 30, 1988 request for information on the FBI's investigation of the murder of Police Officer Snow (FOIA Request No. 310265, "Snow Request") and plaintiff's January 10, 1989 request for information on Victor Forni (FOIA Request No. 306424, "Forni Request"). Because a thorough discussion of the history of this case appears in the court's November 29, 1990 opinion, the court will not repeat it here.

In its November 29, 1990 opinion and December 13, 1990 order, this court granted defendant's cross-motion for summary judgment and denied plaintiff's cross-motion for summary judgment with respect to the Snow file as to all FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap sheet information mentioned in defendant's Snow file, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. The court also denied defendant's cross-motion for summary judgment and granted plaintiff's cross-motion for summary judgment with respect to the Snow file as to the names of witnesses in the Snow investigation, the names of FBI support personnel, and the names of other law enforcement personnel not covered by the court's interpretation of categorical balancing. In light of Mr. Forni's consent to the release of his FBI file, this court also partially granted plaintiff's motion for summary judgment on his Forni request, allow-

ing defendant to redact that file in a manner consistent with the court's opinion respecting the Snow file.

DISCUSSION

When adjudicating the withholding of information under FOIA, district courts must determine the matter *de novo*, requiring the defendant to bear the burden of proving that the information not released by defendant comes within a statutory exemption. § 552 (a) (4) (B); *King v. U.S. Dept. of Justice*, 830 F.2d 210, 217 (D.C.Cir.1987). Courts reviewing FOIA requests must also give effect to the strong presumption in favor of releasing requested documents. *I.E.B.W. Local No. 5 v. U.S. Dept. of Housing & Urban Development*, 852 F.2d 87, 89 (3d Cir.1988).

Exemption 7(D)

Defendant argues that this court erred in applying an exemption 7(C)-type balancing test to determine which information may be withheld from plaintiff under exemption 7(D). The court does not agree. In describing in its Summary Judgment brief the material withheld by the FBI under exemption 7(D), the government stated:

> The FBI claimed exemption 7(D) pursuant to plaintiff's Snow request to protect sources of information, including information obtained from non-federal law enforcement agencies, identified in the bank robbery investigation. Additionally, the FBI applied exemption 7(D) to information that could reasonably disclose the identity of a source (citations excluded) . . . Symbol source materials were also withheld under this exemption, as well as information obtained from confidential sources. Defendant's brief in support of summary judgment at 20-21.

Contrary to defendant's position, this court did not apply an exemption 7(C)-type balancing test to determine what information may be withheld under exemption 7(D). It merely inquired into whether defendant had properly justified the withholding of the information under exemption 7(D).

Under exemption 7(D), information and records are properly exempted from disclosure when disclosure:

> . . . could reasonably be expected to disclose the identity of a confidential source, . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . .

In *Cuccaro v. Secretary of Labor*, 770 F.2d 355 (3d Cir.1985), the Third Circuit reiterated the holding of that court in *Lame v. U.S. Dept. of Justice*, 654 F.2d 917 (3d Cir.1981) that "a person is a confidential source if he or she provided information under an express or reasonably implied assurance of confidentiality." *Cuccaro*, 770 F.2d at 360. The *Cuccaro* court also noted that "where an investigative agency relies upon information supplied by individuals who might suffer severe detriment were their identities disclosed, assurances of confidentiality may reasonably be inferred." *Id.*

In *Lame*, the court declared that "[w]hether there is an expressed or implied assurance of confidentiality

is a question of fact to be determined in regard to each source." *Lame*, 654 F.2d at 923. Despite shouldering the burden of proof as to the applicability of exemption 7(D) to the particular information withheld, defendant proffered no evidence to support its claim that persons protected by the FBI's withholding of information under exemption 7(D) were confidential sources. This circuit has not adopted the view proffered by defendant that promises of confidentiality are "inherently implicit" when the FBI solicits information. To do so would severely limit the breadth of agency disclosure available under FOIA. In limiting the government's power to withhold information in this case to that information which could reasonably be expected to disclose the identity of an undercover FBI agent or FBI informant, this court merely gave effect to the requirements set forth in *Cuccaro* and *Lame* and, in addition, determined that informational exchanges between the FBI and undercover FBI agents or FBI informants are subject to a presumption of confidentiality.

Defendant also argues that the court's opinion and order denied defendant the full protection of exemption 7(D) by not exempting from disclosure information from a confidential source that "would not reveal the identity of that [confidential] source." Defendant's brief, p. 3. Citing the D.C. Circuit's opinion in *Duffin v. Carlson*, 636 F.2d 709 (D.C.Cir.1980), the *Lame* court declared:

> Section 7(D) provides two protections. It protects from disclosure: (a) "the identity of a confidential source" and (b) for a criminal law investigation, "confidential information furnished only by a confidential source" . . . Once it has been determined that a source is confidential, all information that source has provided is exempt from disclosure under the second part of the exemption. *Lame*, 654 F.2d at 923-24.

This court agrees with defendant. Assuming that defendant can establish that a source is confidential, then the defendant may withhold all information from such sources. In other words, defendant may withhold under exemption 7(D) all information from those whom the court has determined to be confidential sources.

Exemption 7(C)

Defendant further argues that this court erred in its exemption 7(C) analysis. Exemption 7(C) allows the government to withhold:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

In reliance on exemption 7(C), "the FBI withheld the names of [s]pecial [a]gents, FBI support employees, police officers and other third parties. The FBI also withheld the initials of FBI employees." Defendant's brief in support of Summary Judgment, at 15.

Under the traditional balancing scheme applicable to exemption 7(C), where an individual mentioned in the withheld information has an interest in privacy, the court must determine whether to release that information by "weighing the public benefit

which would result from the disclosure against the privacy interest and the extent to which it is invaded." *Patterson by Patterson v. FBI*, 893 F.2d 595, 601 (3d Cir. 1990), *cert. denied, Patterson v. FBI*, —— U.S. ——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990) (quoting *Cuccaro*, 770 F.2d at 359.). In *U.S. Dept. of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), however, the Supreme Court declared that "for an appropriate class of law enforcement records or information a categorical balance may be taken." *Id.* at 777, 109 S.Ct. at 1484. "Categorical decisions may be appropriate and individual circumstances disregarded", stated the court, "when a case fits into a genus in which the balance characteristically tips in one direction" *Id.* at 776, 109 S.Ct. at 1483.

Declaring that rap sheet information qualified for categorical balancing under exemption 7(C), the Supreme Court in *Reporter's Committee* stated:

> If it is always true that the damage to a private citizen's privacy interest from a rap sheet's production outweighs the FOIA-based public value of such disclosure, then it is perfectly appropriate to conclude as a categorical matter that production of such [rap sheets] should reasonably be expected to constitute an unwarranted invasion of personal privacy. *Id.* at 779, 109 S.Ct. at 1484.

Applying the categorical balancing approach announced in *Reporter's Committee* to this case, this court determined that the FBI properly withheld the names of FBI informants and FBI undercover agents. However, this court concluded that the other information withheld by defendant under exemption

7(C) was not the type of information envisioned by the Supreme Court when it promulgated its exception to the particularized balancing approach traditionally associated with exemption 7(C).

In its brief, the government urges that the identity of all persons (including FBI support personnel) giving and receiving information pursuant to the FBI's investigation should be exempt from disclosure under the categorical balancing approach adopted in *Reporter's Committee*. Under the government's interpretation of categorical balancing, however, the public might be able to learn of agency wrong-doing without being able to identify those committing it or with knowledge of it. Because this result would confound the purposes of FOIA, this court will not extend *Reporter's Committee* in the manner suggested by the government.

After concluding that the remaining information did not qualify for categorical balancing, the court then applied the traditional 7(C) balancing approach, weighing, as best it could given the limited information provided by the government, the FOIA-based public interest asserted in this case against the individual privacy interests and the invasion of individual privacy associated with disclosure.

Reaffirming the view it expressed in *Dept. of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1975), the *Reporter's Committee* court declared that "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny . . . rather than on the particular purpose for which the document is being requested."

Reporter's Committee, 489 U.S. at 772, 109 S.Ct. at 1481. As stated above, this court's delineation of the FOIA-based public interest asserted in this case falls squarely within this definition. In challenging the court's delineation of the FOIA-based public interest, defendant mischaracterizes the court's analysis.

Framing the FOIA-based public interest in this case largely out of the factual findings of prosecutorial misconduct made in *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J.1989), this court stated:

> Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might lead to the petitioner's acquittal, such person and the public should be entitled to examine that information *and the reasons and policies surrounding its concealment. Landano v. Dept. of Justice*, 751 F.Supp. 502, 503 (emphasis added).

While not finding that the FBI had itself committed any wrongdoing, the court nonetheless recognized a FOIA-based public interest in this FOIA request on account of the investigative relationship between the ultimate prosecution of this matter and the FBI. This recognition of a FOIA-based public interest does not run afoul of *Patterson*.

In upholding the district court's granting of summary judgment against plaintiff under exemption 7(C), the *Patterson* court declared:

> In view of its finding that the FBI had not participated in any illegal conduct, the district court concluded that only a negligible benefit would inure to the public by releasing the names of FBI personnel. As a result of our independent examination of the documents, we find that the district court's conclusion is correct. *Patterson*, 893 F.2d at 601.

Patterson concerned the activity of one agency, the FBI, and documents the FBI held concerning its investigation of a child's request for information from various foreign countries. Even on those facts the court did not rule out the possibility that a FOIA-based public interest could be asserted. It only stated that, given no finding of illegal activity on the part of the FBI, any public benefit of disclosure would be "negligible" at best. Moreover, unlike the situation here, no specific finding of wrong-doing was made against any actor in *Patterson*.

The fact that the agency from whom the information has been sought is not guilty of any wrongdoing is not dispositive. Another agency may be the wrongdoer but the evidence may be found in the files of the "innocent" agency. For instance, the court offers the following hypothetical: The Environmental Protection Agency ("EPA") has investigated and recorded numerous instances in which large corporations have violated criminal environmental protection statutes by illegally polluting the environment. The EPA has passed this information on to the United States Attorney's Office in an effort to have these polluters prosecuted. Due to an illegal policy of not enforcing these environmental statutes against large corporations, the United States Attorney's Office refuses to prosecute the polluters. A newspaper reporter has reason to believe that the United States Attorney's Office is acting improperly by failing to prosecute the polluters. Under the government's interpretation of FOIA, that reporter would not be able to examine EPA files concerning the polluting cor-

porations because the reporter cannot establish any wrong-doing on the part of the EPA.

That the larger coordinated activity in this case is tainted by wrong-doing must bear on whether plaintiff has asserted a legitimate FOIA-based public interest in favor of disclosure. This court does not believe that *Patterson* contemplated a policy that would bar public disclosure of information from one actor in a tainted coordinated activity because that actor had not itself been found to have committed any wrong-doing. Such a result would seem especially harsh where, as here, the information sought may shed further light on the government's role in the tainted coordinated activity, may potentially exculpate an individual who has been convicted of murder, and may reveal a policy of concealment which should concern us all.

In view of the FOIA-based public interest recognized by this court, the time which has elapsed since the Snow and Forni investigations, the information already known about persons sought to be protected, and defendant's failure to enunciate one case-specific reason why any of the persons sought to be protected by the government have a compelling interest in nondisclosure, this court must adhere to its prior decision that the FOIA-based public interest in disclosure of the information outweighs the individual privacy interests in nondisclosure in this case.

Defendant's Request for A Stay

Defendant requests that this court stay its December 13, 1990 order pending appeal of this court's decision. In order to obtain a stay from this court, defendant must show a likelihood of success on the merits, irreparable injury absent a stay, that the

public interest requires that a stay should be granted, and that plaintiff will suffer no injury thereby. *Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C.Cir.1977). As defendant has not convinced this court that it meets this standard, and plaintiff would suffer injury if a stay were granted, this court denies defendant's application for a stay. In addition, on account of the time that has elapsed since its last order, this court extends the time for document production as specified in the order that follows.

CONCLUSION

For the foregoing reasons, this court grants defendant's motion and clarifies its prior decision and order.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-5161

VINCENT JAMES LANDANO

v.

UNITED STATES DEPARTMENT OF JUSTICE; THE FEDERAL BUREAU OF INVESTIGATION, APPELLANTS

[Filed Apr. 14, 1992]

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD, ROTH, and ALDISERT, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for panel rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

Judges Becker, Stapleton, Mansmann, Greenberg, and Hutchinson would have granted rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Apr. 14, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45469